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No. 00-433

In The

Supreme Court of the United States

WESTSIDE QUIK SHOP, INC., ET AL.,

Petitioners,

vs.

ROBERT M. STEWART, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of South Carolina

MOTION TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE SOUTH CAROLINA COIN OPERATOR'S ASSOCIATION, INC. IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE ON BEHALF OF THE SOUTH CAROLINA COIN OPERATOR'S ASSOCIATION, INC.

The South Carolina Coin Operator's Association, Inc. respectfully petitions this Court for leave to file the annexed brief Amicus Curiae pursuant to Supreme Court Rule 37.2(b). Written consent of all the parties was sought pursuant to Supreme Court Rule 37.2(a). The Petitioners have given their consent to this Amicus brief. However, the Respondents have refused to consent to the filing of the Amicus brief.[1]

IDENTITY AND INTEREST OF AMICUS CURIAE

The South Carolina Coin Operator's Association is a non-profit South Carolina corporation formed for the purposes of representing the trade interests of various businesses and individuals who operate gaming machines in South Carolina. The Association was founded in 1963 and has 126 members. The Association's members all owned or operated some form of gaming machines, including video games, pinball machines, as well as video poker machines such as are at issue in the matter before the Court. Consequently, the issues before the Court are of extreme interest to all the members of the Association, and a number of, if not all of the members of the Association have been affected by the statute at issue in this matter.

[1] Copies of the request for consent have been filed with the Clerk of Court. Petitioner's consent has also been filed with the Clerk of Court.

The South Carolina Coin Operators Association has a substantial interest in supporting the Petition for Certiorari because the South Carolina Supreme Court's decision upholding the South Carolina statute banning all video poker machines within the State of South Carolina raises important questions concerning the limits placed on the police power by the takings clause of the Fifth Amendment. This question is especially significant in the situation before the Court here, since the State had, for many years, permitted and regulated the activity it now has banned completely. As a result, those who invested in their property with the expectation that video gaming was and would remain permissible have had their property destroyed as the result of an arbitrary exercise of the State of South Carolina's police power, an exercise that received the approval of the South Carolina Supreme Court but that contradicts this Court's ruling on takings and the proper limits of the police power.

This brief will discuss the historical context in which video gaming became legal in South Carolina, the statutory and regulatory developments that governed the industry, and the resulting expectations of those who invested in a legal enterprise and whose property has now, as the result of a legislative about-face, been destroyed. In these circumstances, the South Carolina Legislature's exercise of its police power to destroy the investment-backed expectations of those who invested in this industry, and the South Carolina Supreme Court's approval of this action, raises important questions about the proper interplay between the police power and the Fifth Amendment's takings clause.

For the foregoing reasons, the South Carolina Coin Operator's Association requests that this motion to file the annexed brief Amicus Curiae be granted.

October 20, 2000.

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BRIEF AMICUS CURIAE OF THE SOUTH CAROLINA COIN OPERATOR'S ASSOCIATION, INC. IN SUPPORT OF PETITIONER

The South Carolina Coin Operator's Association Institute respectfully submits this brief Amicus Curiae.[2]

IDENTITY AND INTEREST OF AMICUS CURIAE

The identity and interest of Amicus Curiae are set forth in the preceding motion and are adopted herein.

OPINIONS BELOW AND JURISDICTION

Amicus hereby adopts Petitioner's description of the opinions below and jurisdictional statement.

STATEMENT OF THE CASE

Amicus adopts Petitioner's statement of the case, and in addition, adds the following: Gambling has not always been illegal in South Carolina. *Berkebile v. Outen*, 426 S.E.2d 760, 762 (S.C. 1993). For example, during the Colonial period, as Walter Edgar points out in his recent and comprehensive study, people enjoyed attending fairs at which they could be amused by both cockfights and horse races. Walter Edgar, *South Carolina: A History*, 171 (1998 U.S.C. Press). These diversions commonly included some form of gambling; "Carolinians of all classes (including slaves) attended cockfights and horse races and placed their bets . . . ." *Id.*

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[2] In compliance with Supreme Court Rule 37.6, Amicus Curiae represent that no counsel for any party authored this brief in whole or in part and that no person or entity, other than the Amicus Curiae and their members, made a monetary contribution for the preparation or submission of this brief.

Statutes placing some limitations on gambling can be traced as far back as 1712 when the Legislature adopted the English Statutes of Anne. *Cf. Berkebile v. Outen*, 426 S.E.2d 760, 763 (S.C. 1993) (discussing adoption of the Statutes of Anne). In particular, Act 141, initially passed in 1664 during the reign of Charles the Second, addressed "deceitful, disorderly and excessive Gameing." As the preamble to this Act made clear, Act 141 was not intended to ban gaming altogether. Instead, it recognized that "all lawful games and exercises should not be otherwise used, than as innocent and moderate recreations . . . ." The Act, which contains a list of common entertainments of the time, addressed the problem of cheating by those who by:

> fraud, shift, cousenage, circumvention, deceit, or unlawful device, or ill practice whatsoever, in playing at or with cards, dice tables, tennis, bowles, kettles, shovel-board; or in or by cock-fightings, horse races, dog matches, foot races, or other pastimes, game or games whatsoever, . . . win, obtain, or acquire to him or themselves, . . . any sum or sums of money, or other valuable thing or things whatsoever; that then every person and persons so offending as aforesaid, shall *ipso facto* forfeit and lose treble the sum or value of money, or other thing or things so won . . . .

Appendix to Act 322 of 1712, 16 2 C. c. 7, reprinted in 2 S.C. Stat. at Large 517 (1837). Another part of the Act provided a remedy for anyone who lost more than 100 pounds at any one time while playing or betting on the games and pastimes enumerated. Thus, the Act made cheating illegal, and it encouraged citizens to be moderate in their gaming. This part of the Act, as amended and containing a fifty dollar limit, is still in effect today. S.C. Code Ann. § 32-1-10 (Law. Co-op. 1976). It has been

applied to losses incurred while playing video poker. *See, e.g., Berkebile,* 426 S.E.2d at 763.

Likewise, decisional law from the early nineteenth century reflects the legality of at least some forms of gaming during the early years of the State's history. *See, e.g., Barret v. Hampton,* 4 S.C.L. (2 Brev.) 226 (1807) (twenty dollar wager on a horse race was not illegal); *Hasket v. Wootan,* 10 S.C.L. (1 Nott. & McC.) 180 (1815) ("[W]agers on horse racing, have not been deemed illegal, either at common law, or under the statutes, if they be fair and under the sums specified in the statutes."); *State v. Pinchback,* 9 S.C.L. (2 Mill Const.) 128 (1818) (noting that raffles are not illegal lotteries, and have "been practised in this State since its first settlement").

Wagering was not the only type of gambling tolerated in the colony. Lotteries, both public and private, were also legal until 1751, when the Legislature enacted the first statute prohibiting "private" lotteries. This statute, passed as Act no. 784 that year, made it a crime to:

> erect, set up, continue or kept, any lottery, under the denomination of sales of houses, lands, plate, jewels, goods, wares, merchandise or other things whatsoever, by way of lottery or chances, or by lots, tickets, numbers or figures
>
> . . . .

Act 784 of 1751, reprinted in 3 S.C. Stat. at Large 729-30 (1838). Although this statute also provided it would remain in force for only a period of ten years, the 1762 Legislature re-enacted it.[3]

While private lotteries were illegal, public lotteries were used to raise funds for various projects. Between the

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[3] This statute still exists today in substantially the same form. S.C. Code Ann. § 16-19-10 (Law. Co-op. 1976).

late 1700s and 1868, when the post-war Constitution, containing a prohibition on all lotteries, was enacted, the Legislature passed several statutes authorizing public lotteries for various purposes. In particular, these lotteries were intended to raise funds to build churches and schools and to provide funding for certain charitable, literary, or industrial groups. Funds collected in this way were used, for example, to fund a home for the poor in Georgetown, to establish cotton manufactories, to raise money for the Savannah River Literary Society, and to build churches. Not until 1868 did South Carolina finally decide to prohibit this form of raising money through a provision in its post-war Constitution. S.C. Const., Art. XIV, § 2 (1868). A public referendum is to be held this November on a proposed Constitutional amendment that would again permit a public, statewide lottery.

In 1790, the Legislature enacted "An Act for the better observation of the Lord's Day, commonly called Sunday," which prohibited anyone from, among other activities, keeping "any gaming table or permit any game or games to be played in his house on the Sabbath day . . . ." Act 320 of 1712, reprinted in 2 S.C. Stat. at Large 396 (1837); *see also* S.C. Code Ann. § 16-19-70 (Law. Co-op. 1976) (prohibiting gaming tables or "playing games" on the Sabbath). Then, in 1802, the Legislature passed a statute banning certain forms of gambling in public places. The 1802 gambling statute outlawed:

> any game or games, with cards or dice, or at any gaming table, commonly called A B C or E O, or any gaming table, known or distinguished by any other letters, or by any figures, or rowley powley table, or at rouge and noir, or at any faro bank, or at any other gaming table or bank of the same or the like kind, under any denomination whatsoever . . . .

1802 Acts and Resolutions at 34-35; *see also* S.C. Code Ann. § 16-19-50 (continuing this prohibition). Later in the nineteenth century and early part of the twentieth century, the South Carolina Legislature outlawed other particular forms of gambling, including betting on elections, gambling by railroad passengers, bookmaking, and gambling through punchboards. *See, e.g.*, S.C. Code Ann §§ 16-19-90, 16-19-130, 16-19-160 (containing current versions of these enactments).

During more recent history, as attitudes toward gambling began to change nationwide, South Carolina enacted some exceptions to the heretofore broad prohibitions against gambling. For example, through a Constitutional amendment, enacted by popular vote in 1975, bingo was specifically exempted from the prohibition against lotteries. The constitutional prohibition against lotteries now excepts "[t]he game of bingo, when conducted by charitable, religious or fraternal organizations . . . or when conducted at recognized annual State and county fairs." S.C. Const., Art. XVII, § 7 (1975). Consequently, bingo parlors and church-sponsored bingo games are today readily available to South Carolina's citizens.

Similarly, in 1975, the South Carolina Legislature specifically exempted from the prohibitions found in chapter 19 of title 16 "coin operated nonpayout machines with a free play feature." S.C. Code Ann. § 16-19-60. The South Carolina Supreme Court made clear that this provision applied to video poker machines in *Powell v. Red Carpet Lounge*, 311 S.E.2d 719 (S.C. 1984). In 1993 the South Carolina legislature enacted the Video Game Machines Act, S.C. Code Ann. §§ 12-21-2770 through 12-21-2804. This Act set forth requirements for licensing, taxing, and regulating video poker machines. License fees

were set at 2,000 dollars per machine. Only five machines could be set up at any single place. *Id.* at 12-21-2804(A). Advertising and offering special inducements to play were prohibited. *Id.* at (B). Persons under twenty-one years of age could not play, and no one could play on Sunday. *Id.* at (C) and (E).

The 1993 Act also provided for a county-by-county referendum to determine, for each county, whether to permit video gaming. Voters in thirty-four of the State's counties voted to continue the activity (including, for example, Greenville County), while twelve counties voted to discontinue video gaming. Statewide, approximately 58% of the voters voted in favor of continuing video gaming, and 42% voted against. As a result of the outcome, video gaming operators were confident that the law would continue to enable their businesses to operate, and some of them began to increase their investments in their businesses. (*See, e.g.*, Affidavit of James Ronald White at ¶ 7.)

The legal developments over the latter quarter of the twentieth century in South Carolina, which led to an official acceptance of certain forms of gaming, were mirrored by a relaxation of the rules against gambling in numerous other states. According to the June, 1999 Report of the National Gambling Impact Study Commission, at least forty-eight states have legalized gambling in some form. Final Report, National Gambling Impact Study Comm'n (June 1999). Thirty-seven states have state-run lotteries, and casinos are now legal in twenty-eight states, including North Carolina. In 1998, 52 percent of American residents played a lottery, 29 percent gambled at a casino, 7 percent bet on horses, and 6 percent played bingo. Nationwide, thirty-four billion dollars was spent on lotteries alone.

The legal developments regarding video gaming in South Carolina were therefore not unusual when viewed through a national perspective, nor was there anything in South Carolina's legal history that would forecast the complete and sudden disruption, in July, 2000, of what had become a vital, statewide industry.

That is what occurred, however. In 1999, in Act 125, the South Carolina Legislature decided that it would put to a statewide public referendum the issue of whether video gaming should remain legal. Act 125 also contained a provision that reclassified video gaming machines as "contraband" as of July 1, 2000, in the event no referendum was held. When the South Carolina Supreme Court ruled that the referendum was an improper delegation of the lawmaking power to the electorate, it also upheld the portion of the Act that declared the machines to be contraband and ruled that the Act outlawed video gaming. *Joytime Distributors & Amusement Co. v. South Carolina*, 528 S.E.2d 647 (S.C. 1999).

SUMMARY OF ARGUMENT

The takings clause of the Fifth Amendment has its origins in equitable notions of fairness. Thus, the Fifth Amendment protects property rights when a government induces investment in that property, even if the government makes no express contract or other promise to induce the investment. Nor can a government avoid the Fifth Amendment's requirements by reversing its course, by labeling a heretofore legal activity "illegal," and by calling its actions "valid" under the police power.

ARGUMENT

I. The Takings Clause, With Its Origins in Equity, Protects Those Who Reasonably Rely on Government Action When Investing in Property and Requires Government to Compensate Those Whose Property is Rendered Valueless by a Government's Abrupt Change in Policy, Even When Government Invokes the Police Power as a Basis for Action.

This Court has recognized that the Fifth Amendment, and in particular the takings and due process clauses, protects those who justifiably rely on government action – even when that action is in effect a failure to act – when that action (or inaction) has induced persons to invest in property that the government later takes. *See, e.g., Kaiser Aetna v. United States*, 444 U.S. 164 (1979) (federal government's creation of public right of access to Kuapa Pond violated Fifth Amendment absent just compensation, since government agency had awarded permit and permitted extensive investment in project before demanding free public access). Government action, or in some cases, government failure to correct the impression government has given a private party, "can lead to the fruition of a number of expectancies embodied in the concept of 'property' – expectancies that, if sufficiently important, the Government must condemn and pay for before it takes over management of the landowner's property." *Id.* at 179 (citations omitted). Property rights are thus protected when the government induces investment in that property, even if the government makes no express contract or other promise to induce the investment. *Id.*

That is precisely what has happened in this case. Between 1975 and 1999, the State of South Carolina permitted – and in some instances, required, through its regulations – private parties to invest in what was an

entirely legal means of public entertainment. During that period of time, through legislative pronouncements and court rulings, the State gave its official sanction to a course of action that included purchasing equipment, investing in land and buildings, setting up business entities, hiring personnel, acquiring licenses, acquiring State-mandated sophisticated equipment to permit State monitoring, and paying taxes. Certainly, the persons who took these actions were not on a "fool's errand." Instead, they took these actions with the understanding that the State had made this form of gaming legal and had set up a regulatory framework in which the industry was to operate within the law. For the State to require these persons to bear the entire economic brunt of the State's abrupt change in policy violates well-established principles of takings jurisprudence.

In short, this case presents an example of the harm that results when a state views its police power as unlimited. As Richard Epstein has pointed out, "[t]he police power cannot be interpreted as an unrestricted grant of state power to act in the public interest, for then the exception will overwhelm the [takings] clause." Richard A. Epstein, *Takings: Private Property and the Power of Eminent Domain* at 109 (Harv. Univ. Press 1985). Instead, the police power has limits, and this case illustrates where those limits are found: in arbitrary actions that contradict a prior course of government conduct upon which property owners have relied.

As will be set forth more thoroughly below, property rights were of paramount significance to the framers of the Constitution. These rights, and more particularly the takings clause of the Fifth Amendment, derived from equitable concepts rooted in the common law and in the principles of equity. While a government could, in certain

circumstances, "take" private property for public use, any law authorizing such action was void unless it provided for fair payment in return. This rule extended not just to physical "takings," but to other government action that diminished the owner's right to use the property and exercise dominion over it. In effect, the law recognized that "property" consisted of much more than just a piece of real estate or other tangible thing; it was viewed as a collection of rights, including the right of the owner to make appropriate legal use of that property, limited only by the law of nuisance. As James Madison put it in his essay on property: "as a man is said to have a right to his property, he may be equally said to have a property in his rights." James Madison, Property, 1 *National Gazette*, Mar. 29, 1792, at 174 (Reprinted in 4 Letters and Other Writings of James Madison 480 (1865). If a government takes one of those rights – one of those sticks in the "bundle of sticks" called "property" – it takes something that belongs to the owner.

In this case, after inducing those in the industry to invest in a legal enterprise, the State of South Carolina has unquestionably taken their property, and has done so without making any attempt to compensate the owners for their "investment-backed" expectations. In this way, the participants in the video gaming industry have unfairly and illegally borne the entire and costly burden of the State's policy shift. This is precisely what the Fifth Amendment's "takings" clause was designed to prevent. *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

A. The Equitable Basis for "Takings" Jurisprudence Provides a Historical Context for Evaluating a Government's Action Pursuant to the Police Power.

At the time it was proposed and adopted, the "takings" clause of the Fifth Amendment did not express any novel theory of rights. Instead, it merely recognized what was viewed by the framers as a fundamental principle of the common law: that the law should protect persons in the use and enjoyment of their property. J.A.C. Grant, *The "Higher Law" Background of the Law of Eminent Domain*, 6 Wisc. L. Rev. 67 (Feb. 1931).[4] Accordingly, although the majority of the original thirteen states had no constitutional prohibition against a government "taking," the courts of those states still found authority, citing common law or "natural equity," for the principle that property should be protected from an uncompensated seizure by government. Grant, *supra*, 6 Wisc. L. Rev. at 71.

The protections afforded by this understanding of property rights were broad. For example, when the State of New York enacted a statute outlawing dams across any creek or river flowing into one of the Great Lakes unless

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[4] While ethicists now criticize the "natural law" underpinnings of Enlightenment thinking, the Enlightenment's "traditional" theory of rights can be justified when analyzed according to a process that is "aimed . . . at showing that rights are grounded in the normative claims inherent in the basic subject matter of ethics – human action. This normative theory of action is then connected with or explicated over an entitlement theory of distributive justice that characterizes the world in terms of holdings or property and goes on to explain how those holdings arise or come to be attached to particular people or institutions, either legitimately or illegitimately." Roger Pilon, *Property Rights, Takings, and a Free Society*, 6 Harvard Journal of Law and Public Policy 165, 173-74 (1983).

the dam provided a slope for salmon, the New York Supreme Court ruled that the statute was illegal as it applied to a particular dam situated on a nonnavigable stream, both because it impaired a contract and because it violated the owner's vested right to the use of his property without offering any compensation for his compliance with the statute. *People v. Platt*, 17 Johns. 195, 215 (N.Y. 1819); *see also Bradshaw v. Rodgers*, 20 Johns. 103 (N.Y. 1822) (Any law violating a fundamental principle of government, that is, that government may not take private property without paying compensation, "must be deemed a nullity, as it is against natural right and justice.").

Moreover, in another case, to the argument that the applicable constitution was silent on the subject, the Supreme Court of New Jersey replied:

> The right to take private property for public use, does not depend on constitutional provisions, but is one of the attributes of sovereign power. . . . This power to take private property reaches back of all constitutional provisions; and it seems to have been considered a settled principle of universal law, that the right to compensation, is an incident to the exercise of that power: that the one is so inseparably connected with the other, that they may be said to exist not as separate and distinct principles, but as parts of one and the same principle. . . .
>
> And Story, calls the provision on this subject, in the constitution of the United States, merely 'an affirmance of a great doctrine established by the common law.' This principle of public law, has been made by express enactment, a part of the Constitution of the United States; . . . but it has been decided that as a constitutional provision, it does not apply to the

> several states. Still, if the opinions of the above distinguished jurists be correct, it is operative as a principle of universal law; and the legislature of this State, can no more take private property for public use, without just compensation, than if this restraining principle were incorporated into, and made part of its State Constitution.

Sinnickson v. Johnson, 17 N.J.L. 129 (1839) (citations omitted); *see also Petition of Mount Washington Road Co.*, 35 N.H. 134 (1857) (finding that, even though New Hampshire Constitution did not contain a "takings" provision, there was no intention to repudiate "the well established maxim of universal law, that private property cannot be taken for public use without just compensation to the owner"); *Young v. McKenzie*, 3 Ga. 31 (1847) ("takings" clause of federal constitution did not create "new principle of restriction," but rather "declare[d] great common law principle . . . which has existed from the time of Magna Carta . . . . ").

This Court has also recognized the inherent equitable underpinnings of the "takings" provision. As noted in *Fuller v. United States*, "[t]he constitutional requirement of just compensation derives as much content from the basic equitable principles of fairness, as it does from technical concepts of property law." 409 U.S. 488, 490 (1973) (citing *United States v. Commodities Trading Corp.*, 339 U.S. 121, 124 (1970). In short, the right of an individual to own and enjoy property is one of the fundamental rights on which our system of law and government rests. When we, as the governed, delegate powers to the government, we do so with the fundamental understanding that the government has only limited powers with respect to our property. The rights we have to our property are, in essence, a premise of our compact with government, rather than a result of that compact.

Thus, the rights inherent in the ownership of private property are at the very core of a free society. Roger Pilon, *Property Rights, Takings, and a Free Society*, 6 Harvard Journal of Law and Public Policy 165, 170 (1983). As John Locke noted, all human rights can be viewed as matters of property. *Id.* at 172 (citing John Locke, *The Second Treatise of Government* § 123 (rev. ed. P. Laslett ed. 1965). According to this view,

> the free society is a society of equal *rights*: stated most broadly, the right to be left alone in one's person and property, the right to pursue one's ends provided the equal rights of others are respected in the process, all of which is more precisely defined by reference to the property foundations of those rights and the basic proscription against taking that property. And the free society is also a society of equal *freedom*, at least insofar as that term connotes the freedom from interference that is described by our equal rights.

Pilon, *supra*, at 175 (emphasis in original).

Hence, more than a century before *Pennsylvania Coal v. Mahon*, 260 U.S. 393 (1922), the New York Supreme Court understood that the common law of eminent domain would require compensation for what was essentially an exercise of the state's "police power" to protect salmon, insofar as that exercise interfered with the Platt's right to operate a mill on his property. *People v. Platt*, 17 Johns. at 215. As the court there noted:

> Private property may, in many instances, be appropriated to public use; but such appropriations are constitutional, legal, and justifiable, only when a fair and just equivalent is awarded to the owner of the property thus taken. In the present case, no equivalent is offered, or provided, for the loss which must inevitably ensue,

> upon a compliance with the requirements of the statutes on which the indictment is founded.

Id. In this way, the New York Supreme Court recognized the appropriate limits on the legislature's pre-twentieth century "regulatory" taking: what might have been accomplished if fair compensation had been awarded could not be accomplished in the absence of such. There is no rational basis for applying a different standard to the South Carolina Legislature's action in this case.

B. Property Rights Encompass All Non-Nuisance Uses that May be Made of the Property.

In *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1027 (1992), this Court agreed that state property rights can be defined by reference to traditional "background principles of property law, such as state law." In South Carolina's traditional principles of property law, "property" is defined broadly. As the South Carolina Supreme Court has described it,

> [t]he term 'property' is, in law, a generic term of extensive application. It is a term of large import, of broad and exceedingly complex meaning, of the broadest and most extensive signification, a very comprehensive word, and is most comprehensive of all terms which can be used. The term is often called 'nomen generalissimum,' and is employed to signify any valuable right or interest protected by law, and the subject matter or things in which rights or interest exist.

Lott v. Claussens, Inc., 163 S.E.2d 615, 617 (1968).

Applying these concepts, when addressing the scope of an interference with a person's property rights, a court should look to the rights the person had in his or her property at the time he or she acquired title to such

property. For the purposes of this Petition, the rights obtained when title to a video gaming machine was acquired included the right to use that machine legally as a source of business income. Video gaming, more specifically, video poker machines, have been legal in South Carolina for at least 25 years, beginning in 1975, when the South Carolina General Assembly determined that the operation of coin-operated video gaming machines with a free-play feature was lawful in South Carolina. S.C. Code Ann. § 16-19-60 (Law. Co-op. 1976). Since then until this year, the courts of South Carolina upheld the legality of video gambling, so long as cash payouts from these types of machines were paid out by the machine's owner, rather than the machine. *See, e.g., State v. Blackmon*, 403 S.E.2d 660 (1991).

As a result of the legislative enactments and court rulings, those who participated in the video gaming industry did so with the expectation that the rights acquired with the property purchased included the right to permit the public to lawfully use those machines for the purpose they were designed. In reliance the law as it existed at the time, persons invested in video gaming machines, in the land and facilities for housing those machines, and in the other appurtenances necessary for operating as a lawful business, including equipment and licenses required by the State of South Carolina as part of the regulations governing the industry.

There is no doubt, therefore, that owners of video gaming equipment in South Carolina had vested property rights in that equipment and in the facilities that housed it, and that those property rights included the right to permit public use of the equipment for the purpose for which it was designed. The question is not, therefore, whether the State of South Carolina has interfered with

the rights of the video gaming owners' to their property; it has unquestionably done so, and that interference has been substantial. Instead, the question is whether the State could, in the exercise of its police power, declare video gaming illegal and thereby circumvent the Fifth Amendment limitations on its power.

C. Video Gaming Property Is Not Subject to Uncompensated Seizure as A "Nuisance."

There is a valid "nuisance" exception to the "just compensation" requirement. A property owner may not use his or her property in a way that injures his neighbor, that is, he may not create a "nuisance." If he does so, then the state may exercise its "police power" to enforce the public good. *See, e.g., Miller v. Schoene*, 276 U.S. 272, 279-80 (1928) (government could order property owners to cut down cedar trees that were contaminating neighbor's apple trees without paying compensation). A government's police power should not be defined too broadly, however. It is, as John Locke put it, the "Executive Power" to secure our rights, which each of us has in the state of nature, before we yield it up to the state to exercise on our behalf. *See* John Locke, The Second Treatise of Government, *Two Treatises of Government* 13 (Peter Laslett ed., 1960). "The police power as a ground for legitimate public intervention is, then, exactly the same as when a private party acts on its own behalf." Epstein, *supra* at 111. In other words, if property were being used in a way that creates a nuisance, a neighbor affected by that nuisance could seek redress in the courts. Likewise, the State could, in the exercise of its police power, act to abate a nuisance even if no neighbor chose to do so. However, South Carolina cannot, merely by invoking the

words "police power," act to affect property rights in a way that no citizen could properly act.

Thus, South Carolina unquestionably had the power, at one time, to prohibit video gaming from entering the State. If it had taken that path, the persons who over the years have relied on the legality of the machines would not have invested their money and energy into what was, for them, a source of livelihood. A video gaming machine would have, in that event, occupied the same status as a slot machine, legal in some states or some parts of some states, but illegal in South Carolina, and anyone who purchased one for use in South Carolina would have had fair warning of what to expect by way of the State's reaction.

South Carolina did not take that path, however. In fact, the steps taken by the South Carolina legislature over the years, which included authorizing county referenda on the subject pursuant to which voters in some thirty-four of forty-six counties affirmed their desire for video gaming, led participants in the industry to believe that the activity would continue to be a legal and regulated, at least in some counties, aspect of South Carolina life. (*See, e.g.*, Affidavit of James Ronald White at ¶ 7.) As a result, when the State turned 180 degrees in the opposite direction, the persons who have invested in video gaming machines, who have devoted space on their property to housing the machines, who have purchased licenses for the machines, and who had paid taxes on the machines over the years have had their property rendered worthless, declared "contraband" and seized. This result goes far beyond what is permissible under any just theory of property rights and police power. In short, while government may properly exercise its police power to abate a nuisance, it may not, through its actions,

induce persons to engage in the very conduct that it later decides to label a "nuisance" without incurring liability for a "taking."

Moreover, in light of the national statistics on gambling, cited above, any attempt to label any single form of gambling as a "vice," subject to summary treatment under the police power, is doomed to failure. *See generally Greater New Orleans Broadcasting Assoc. v. United States*, 527 U.S. 173, 187 and n.5 (1999) (reviewing statistics on legal gambling, noting that federal policy toward gambling no longer consistent). There is no logical reason why it is acceptable for someone to play bingo at the South Carolina state fair or in a church parlor, to drive to North Carolina to visit a casino, or to visit Georgia to buy a lottery ticket, while it is not acceptable to spend a few dollars at a video poker machine.

Given that video gaming has been legal in South Carolina until just recently and given the other forms of gaming permitted by the State, at the very least, the State Legislature should have identified the reasons why it was singling out video gaming for such precipitous treatment. Instead, the Legislature adopted the illegalization of video gaming as a "fall-back" position, to become law only in the event no referendum on video gaming was held. Consequently, it gave little consideration to the Constitutional implications of its actions, and made no provision for justly compensating those who were to bear the burden of the State's 180 degree turn on the question.

In short, Act 125 destroyed property rights by legislative fiat, taking what had been entirely legal and acceptable one day and declaring it illegal and unacceptable the next. In effect, instead of acting merely to abate a true "nuisance," the State assumed the power to declare that

an activity that had heretofore been legal was a "nuisance" and then acted to abate it. When viewed in light of Lockean principles, this is an invalid exercise of the police power, since no single citizen could have employed these means to affect the petitioners' property rights.

Moreover, to follow the nuisance analogy one step further, any single citizen who had encouraged a neighbor to use his or her property in a certain way and who then decided to label that use a "nuisance" and bring an action for abatement would not likely find a friendly reception in a court of equity. Nor should the State of South Carolina's action be viewed any differently. The takings clause of the Fifth Amendment protects against such arbitrary invocations of the police power. It protects those who, like Petitioners, justifiably rely on government action when making an investment, then whose property is destroyed when government reverses course.

CONCLUSION

For the foregoing reasons, Amicus respectfully requests that this Court grant the Petition for Writ of Certiorari.

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